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IN THE

Supreme Court of the United States

October Term, 1947

No. 18

R. P. HUNTER, *Petitioner*

vs.

TEXAS ELECTRIC RAILWAY COMPANY, *Respondent*

BRIEF OF PETITIONER ON WRIT OF CERTIORARI

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SUBJECT INDEX

	Page
Opinion of Court below	1
Grounds of jurisdiction	2
Concise statement of the case	2
Specification of errors	6
Points presented and argument	7
Summary of argument	7
Point No. 1—Error of the Court in refusing to submit to jury issues of negligence on part of respondent in failing to provide an automatic block signal device in sector of the collision	11
Argument under Point No. 1	11
Point No. 2—Error of the Court in refusing to submit to jury issues of negligence on the part of respondent in employing the system it did for passage of traffic in the sector of the collision	21
Argument under Point No. 2	21
Point No. 3—Error of the Court in refusing to submit to jury issues of negligence on the part of the southbound motorman in failing to properly slow down his car before reaching point of collision	24

INDEX—(Continued)

Page

Point No. 4—Error of the Court in refusing to submit to the jury issues of negligence on the part of the southbound motorman in failure to apply his air brakes as he approached the point of collision 24

Argument under Points Nos. 3 and 4 25

Conclusion 26

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AUTHORITIES

	Page
Bailey v. Central Vermont R. Co., 319 U.S. 350	13
Chicago, St. P. M. & O. R. Co. v. Arnold, 160 Fed. (2) 1002	15
Dallas Railway Term. Co. v. Bankston, 51 S.W. (2) 304	11
Davis v. Kennedy, 266 U.S. 147	17
Eglsaer v. Scandrett, 151 Fed. (2) 552	12
Hines v. Foreman, 243 S.W. 479	11
Hunter v. Tex. Electric Ry. Co., 194 S.W. (2) 281, 91 L. Ed., Adv. Op., No. 11, P. 923	1, 5
Keith v. Wheeling & L.E. Ry. Co., et al., 160 Fed. (2) 654	18, 19
Lavender v. Kurn, 327 U.S. 645	18, 24
Owens v. Union Pacific R. Co., 319 U.S. 715	16
Rules of the Supreme Court of the U.S., Revised Rule 38, Sec. 5, Para. (a)	2
Schlemmer v. Buffalo, Rochester & Pittsburg R. Co., 205 U.S. 1	16
Stoffel v. McCahan Sugar Refining & Molasses Co., 35 Fed. (2) 602	16
Spokane & Inland Empire R. Co. v. Campbell, 241 U.S. 497	18

AUTHORITIES—(Continued)

	Page
Tennant v. Peoria & Pekin U. R. Co., 321 U.S. 29	16, 18
Texas Electric R. Co. v. Eastus, 25 Fed. Supp., 825, affd. 308 U.S. 512, 84 L. Ed. 436, 60 Sup. Ct. 134	3
Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54	15, 17, 19
Unadilla Valley R. Co. v. Caldina, 278 U.S. 330	17
Union Pacific R. Co. v. Hadley, 246 U.S. 330	16
United States Code:	
Title 28, Sec. 344, Para. (b)	2
Title 45, Sec. 54	16

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TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

OPINION OF THE COURT BELOW

The opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, Texas, (R. 147), is reported in 194 S.W. (2) 281.

GROUNDS OF JURISDICTION

A. The jurisdiction of this Court is based upon paragraph (b) of Section 344, Title 28 of the Judicial Code as amended, 28 U.S.C.A. 344.

B. The nature of the case and the erroneous construction placed upon the Federal Employers' Liability Act by the State Court is brought within the jurisdictional indications of paragraph (a) of Section 5, Rule 38, of the Revised Rules of the Supreme Court of the United States, which provides that this Honorable Court may review, on Writ of Certiorari, "(a) where a state court has decided a federal question of substance . . . in a 'way probably not in accord with the applicable decisions of this Court.' "

CONCISE STATEMENT OF THE CASE

Petitioner brought this suit under the provisions of the Federal Employers' Liability Act to recover damages for personal injuries sustained in a head-on collision between two of respondent's railway cars on May 2, 1946, while engaged in interstate commerce.

Respondent's railway line runs from Denison, Texas, located on Red River, the State line between Texas and Oklahoma, through Sherman, Texas, a neighboring city, and ends at Waco, Texas, located in central Texas (R. 89). That portion of the railway line running from Denison, Texas, to Sherman, Texas, is a single track, and passes

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through a wooded lake area known as Woodlake, located about midway between the two cities of Sherman and Denison.

For a complete picture of respondent's operations, see Texas Electric Railway Co. v. Eastus, 25 Fed. Supp., 825, affd. 308 U.S. 512, 84 L. Ed. 436, 60 Sup. Ct. 134.

The collision occurred about three quarters of a mile north of Woodlake between a car piloted by petitioner, R. P. Hunter, bound from Sherman north to Denison, and a railway car operated by one Maxwell, bound from Denison south toward Sherman.

The railway cars at certain times met at Woodlake where the southbound train took siding and permitted the northbound train, driven by petitioner, to proceed north on the main line to Denison, Texas. Petitioner arrived at the Woodlake "meet point" before the arrival of the southbound train. Petitioner stopped and ascertained what he took to be the presence of the southbound car on the siding, and then proceeded ahead upon the main line (R. 45, 82). Without warning by an automatic block signal device that the main line ahead was in fact occupied, petitioner proceeded ahead upon the main line to a point where the two cars both came within view of each other (R. 46-7, 77-8). Petitioner brought his train to a stop (R. 47). The southbound operator, travelling at a high rate of speed, threw his car in reverse and jumped from his train, which proceeded to the point of collision, inflicting serious and permanent bodily injuries upon petitioner (R. 47, 48).

There was appropriate pleading and ample proof that an automatic block signal device formerly maintained at Woodlake, but removed some years before by respondent, would have prevented the collision in question if it had been in operation (R. 2, 82, 73, 77). There was further pleading and proof incident thereto that in the "early thirties" respondent had reduced its train crews upon each car and placed the duties formerly performed by two men upon petitioner (R. 72, 73). It was further shown that respondent still compelled petitioner to perform the duties of two men at the time of the collision, although the traffic operations had increased ten-fold (R. 81).

Petitioner further contended that the southbound car was improperly operated immediately prior to the collision (R. 3).

During the course of the trial, respondent was permitted to file amended pleadings alleging that petitioner had assumed the risk of his employment at the time of the collision (R. 9, 100). Petitioner properly requested that the foregoing questions of primary negligence on the part of the carrier be submitted to the jury for determination (R. 12-19). The trial court denied petitioner's request and refused to submit any question of negligence on the part of the carrier to the jury for determination. The court permitted the jury to pass only on question of discovered peril and sole proximate cause (R. 28, 29).

Deprived of a trial by jury upon the questions of the carrier's negligence, and contending that such depriva-

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tion, in effect, forced him to assume the risks of his employment, petitioner appealed.

The Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin, Texas, affirmed the judgment of the trial court (R. 147). In its written opinion that affirmed the judgment of the trial court, it likewise denied petitioner a jury trial upon the issues of the carrier's negligence, holding that petitioner was concluded by the "primary duty rule," forcing him in effect to assume the risks of his master's negligence and holding further that the Federal Employers' Liability Act was inapplicable in "primary duty rule" cases. The enlightening language of that opinion is here quoted:

> "It is true that appellant alleged that appellee railway company was negligent in the three respects stated, and that each of such acts constituted negligence and the proximate cause of his injury, but under his foregoing testimony his own disobedience of the time card instruction and the rules of appellee caused the collision and injury to himself. In consequence, neither the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. Sect. 51, nor of Art. 6440, Revised Statutes of Texas, have any application to the instant case."

Petitioner, thereafter, without avail followed and exhausted his remedy by appeal in Texas, and this case is now before this Court on writ of certiorari. (Hunter vs. Texas Electric Railway Company, 91 L. Ed., Advance Opinions, No. 11, P. 923)

SPECIFICATION OF ERRORS

The following specifications of error were assigned in the Courts below as the same points of error, and as set out in the petition for writ of certiorari:

FIRST SPECIFICATION OF ERROR

The error of the Court in refusing to submit to the jury issues of negligence on the part of respondent in failing to provide an automatic block signal device in the sector of the collision.

SECOND SPECIFICATION OF ERROR

The error of the Court in refusing to submit to the jury issues of negligence on the part of respondent in employing the system it did for the passage of traffic in the sector of the collision.

THIRD SPECIFICATION OF ERROR

The error of the Court in refusing to submit to the jury issues of negligence on the part of the southbound motorman, in failing to properly slow down his car before reaching the point of collision.

FOURTH SPECIFICATION OF ERROR

The error of the Court in refusing to submit to the jury issues of negligence on the part of the southbound motorman in failing to apply his air brakes as he approached the point of collision.

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POINTS PRESENTED AND ARGUMENT

SUMMARY OF ARGUMENT

I. There was error in refusing to submit to the jury issues of negligence on the part of respondent in failing to provide an automatic block signal device in the sector of the collision.

A. The error in refusing to allow a jury to determine issues of primary negligence on the part of the carrier remains in the case and cannot be affected by adverse findings upon discovered peril.

B. The question of the carrier's negligence in failing to provide an automatic block signal device in the sector of the collision was sufficiently pleaded and overwhelmingly established by the evidence.

1. The petitioner's trial pleading fully pleaded the question of negligence on the part of the carrier in this regard, and such pleadings were conceded by the Court of Civil Appeals to be sufficient.

2. The evidence is undisputed and overwhelming that if the carrier had retained the automatic block signal device in the sector of the collision as it had formerly done, the collision in question would have been averted.

C. The holding of the Court of Civil Appeals that the failure of the carrier to maintain an automatic block signal device in the sector of the collision was

not negligence and not a proximate cause, as a matter of law, was an attempt to deprive petitioner of a right to trial by jury, and an attempt to insulate the carrier from liability by effectually forcing petitioner to assume the risks of his employment.

1. The names and labels used in the veil of logic constructed will not be allowed to screen the carrier from liability for its negligence by forcing the employee to assume the risks of his employment as an effect.

2. The once fashionable logic resorted to in the "primary duty rule" cases now stands in true and naked form as an assumption of risk, and cannot now be resurrected in direct defiance to the will of Congress.

II. There was error in refusing to submit to the jury issues of negligence on the part of the respondent in employing the system it did for the passage of traffic in the sector of the collision.

A. Petitioner's right to the submission of this issue of primary negligence is unaffected by discovered peril.

B. The question of the carrier's negligence in employing the system it did in the sector of the collision was sufficiently pleaded, and was supported by sufficient evidence to support the jury's verdict.

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1. The petitioner's trial pleading fully pleaded the question of negligence on the part of carrier. In this regard such pleading was conceded by the Court of Civil Appeals to be sufficient.

2. The overwhelming evidence disclosed that after a reduction of train personnel during the depression era, respondent by failing to restore sufficient personnel to man the trains had permitted increased traffic to gradually and stealthily impose a negligent system for the passage of traffic in the sector of the collision.

C. The holding of the Court of Civil Appeals that the system employed by the carrier for the passage of traffic in the sector of the collision in view of the undermanned trains and the increased traffic burdens, was not negligence and not a proximate cause, as a matter of law, was an attempt to deprive petitioner of his right to a trial by jury, and an attempt to insulate carrier from liability by effectually forcing petitioner to assume the risks of his employment.

1. The petitioner's trial pleading fully pleaded the question of negligence on the part of the carrier in this regard, and such pleadings were conceded by the Court of Civil Appeals to be sufficient.

2. The evidence is undisputed and overwhelming that, if the carrier had retained the automatic

block signal device in the sector of the collision as it had formerly done, the collision in question would have been averted.

III. There was error in refusing to submit to the jury issues of negligence on the part of respondent's southbound motorman in failing to properly slow down his car, or make proper application of his brakes as he approached the point of collision.

A. There was requisite pleading and proof to authorize submission of these issues.

1. The pleading was sufficient.

2. The evidence disclosed that the southbound motorman had his car wide open, and was driving it as fast as it would go on a straight-away track going into the curve on which the collision occurred. Petitioner contended that respondent, on testifying, presented sufficient facts from which a jury could have properly inferred negligence.

B. The holding of the Court of Civil Appeals that the failure of the respondent's southbound motorman to properly slow down his car or make proper application of his brakes, and going into the curve where the collision occurred with his car wide open and going as fast as he could make it go, was not negligence and not a proximate cause of the collision, as a matter of law, was an attempt to deprive petitioner of his

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right to a trial by jury, and an attempt to insulate the carrier from liability by effectually forcing the petitioner to assume the risks of his employment.

POINT NUMBER ONE

The error of the Court in refusing to submit to the jury issues of negligence on the part of respondent in failing to provide an automatic block signal device in the sector of the collision.

ARGUMENT UNDER POINT NUMBER ONE

Petitioner contends that he was denied a trial by jury upon the submissible issues of liability against respondent. His contention in this regard cannot now be affected by contained findings upon issues of discovered peril. *Hines v. Foreman*, 243 S.W. 479; *Dallas Railway Term. Co. v. Bankston*, 51 S.W. (2d) 304.

In its opinion, the Court of Civil Appeals conceded that the allegations of initial liability against respondent were sufficient. However, because of the view it entertained and of the ultimate disposition made of the case, the Court of Civil Appeals completely pretermitted any discussion or statement of petitioner's testimony that so forcefully necessitated the submission of negligence and causation issues against respondent. But such judicial casuistry cannot be indulged in here. Listen to the testimony as it came from the lips of the witness:

> "A block signal system would have stopped me when a time card did not, because there would have been a red light (R. 82). An automatic block signal is an automatic light set-up, showing red—it would have shown red in my face of the other fellow coming. Between Woodlake and Denison they used to have automatic block signals installed (R. 82). They used to have that red signal to stop if there was danger between Woodlake and Denison (R. 73). *(If they had retained the safety devices they had then with the red signal showing the road was not clear ahead, I would have had a warning and would have stopped." (R. 77-8).)* (Italics ours.)

This testimony alone, and in conjunction with other testimony in the record, with forceful and compelling clarity, raised the issues against respondent and commanded their submission.

These safety devices are in common use by railroads for the averting of accidents under these conditions. The evidence is uncontradicted that such safety devices for the protection of petitioner and others and for the prevention of identical and similar accidents were once installed and since removed, and if they had not been removed would have avoided this collision. In any event it was a question for the trier of fact. In *Eglsaer v. Scandrett* (C.C.A. 7th, 1945) 151 Fed. (2d) 562, the Court said:

> " 'Logic may conclude that the injury resulted from the negligence of the employer, the employee's own want of care, the default of a stranger to the employment, an act of God, or pure accident, or from a com-

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bination of any of these factors, but after logic has thus determined the causal basis of the injury the statute steps in to say that if among these causes there is negligence on the part of the employer as that term is understood in the act, liability of the employer shall follow irrespective of the other factors causally related in whole or in part from negligence even if the negligence of the injured employee or some other factor was logically nearer to or more influential in producing that injury. * * * *(These words 'in part' have enlarged the field or scope of proximate causes—in these railroad injury cases.)* * * These words suggest that there may be a plurality of causes each of which is sufficient to permit a jury to assess liability.'" (Italics ours.)

In *Bailey v. Central Vermont R. Co.* (U. S. Sup. Ct. 1943), 319 U. S. 350, 87 L. Ed. 1444, 63 Sup. Ct. 1062, the Court said:

"The right to trial by jury is a 'basic and fundamental feature of our system of federal jurisprudence', Jacobs v. N.Y., 315 U.S. 752, 86 L. Ed. 1166, 62 Sup. Ct. 854. * * * It is a part and parcel of the remedy afforded railway workers under the Employers' Liability Act. * * * Reasonable care and cause and effect are as illusive here as in other fields, but the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. * * * *(To deprive these workers of the benefits of a trial by jury in close doubtful cases is to take away a goodly portion of the relief Congress has afforded them.)*" (Italics ours.)

The Court of Civil Appeals said:

> "The testimony of appellant having shown as a matter of law that his negligence in violating his time card instruction and the rules of appellee in passing the meeting point without performing the mandatory duties devolving upon him under the rules of appellee was the sole proximate cause of this collision, the only issues that need be submitted were those relating to discovered peril. And the jury having found those issues against appellant he is not entitled to recover." (R. 148)

By refusing to allow the jury to pass upon issues of negligence on the part of the carrier, the Court effectually directed a verdict against petitioner upon his main case.

When the case of an injured but negligent railroad employee is defeated, as a matter of law, by withdrawing from the jury those issues of negligence and requisite causation which he alleged and proved against the carrier, and from which the jury might have reasonably inferred liability—then that employee has been forced to assume the risks of his employment and the negligence of the carrier. In the day of an unenlightened economy, this same result was reached by saying that the negligence proven was that of a fellow servant which the employee assumed, or that the employee's act was contributory negligence. When Congress eliminated these doctrines as a bar to recovery, the Courts began to weave a web of tortuous logic. Now the negligence alleged and proved appeared as a risk inherent in the employment, which the

employee was deemed to have voluntarily assumed by remaining on the job. One variation of this doctrine in the converse appeared as the "primary duty rule," where the master was deemed not to have been negligent because the injuries resulted from the employee's negligent act in violating the master's rule and order, which it was his personal primary duty to obey. In 1939 Congress again struck out with a legislative mandate, but soon the judicial looms began to turn and the weavers began anew. The result is again the same, but the postulate is now found in the field of causation. *Chicago, St. P., M. & O. R. Co. v. Arnold*, 160 Fed. (2) 1002.

The Court of Civil Appeals concluded as a matter of law that the failure to install an automatic block signal device was non-negligence because "* * * the evidence showed that if a block signal system had been installed it would have added nothing to positive time card instructions and the rules of appellee * * *." Or if it was negligence, then it was not actionable negligence—it not being a proximate cause.

Regardless of the name attached or the rigors of reason that brought it forth—regardless of what artifice of logic was utilized in evading the submission of these issues and depriving petitioner of his right to a trial by jury—the result and the effect is the same. It is assumption of risk—pure and simple—artfully arrived at by devious reasoning. *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 Sup. Ct. 444, 143 A.L.R. 967.

Owens v. Union Pacific R. Co., 319 U.S. 715, 87 L. Ed. 1683, 63 Sup. Ct. 1271. *Stoffel v. McCahan Sugar Refining & Molasses Co.*, 35 Fed. (2d) 602. *Schlemmer v. Buffalo, Rochester and Pittsburg R. Co.*, 205 U. S. 1, 51 L. Ed. 681, 27 Sup. Ct. 407. *Tennant v. Peoria & Pekin U. R. Co.*, 321 U. S. 29, 88 L. Ed. 520, 64 Sup. Ct. 409, 15 NCCA (NS) 647.

It is obvious that the trial court and respondent's counsel were proceeding upon this misguided theory when there was filed and permitted to be filed the following trial amendment in the middle of the trial:

> "That the injury received by the plaintiff herein on the occasion in question, if any, resulted solely from a risk he assumed incident to, in the furtherance of, and connected with his employment with the defendant" (9, 100).

This is a "primary duty rule" case. In its fundamental aspect, no attempt has been made to "look at the situation as a practical unit rather than inquire into a purely logical priority." *Union Pacific R. Co. v. Hadley*, 246 U. S. 330, 62 L. Ed. 751, 38 Sup. Ct. 318. If any searching analysis had been made it would have been apparent that the theory and effect of the disposition of this case was in direct defiance of the will of Congress. 45 U.S.C.A. 695, Title 45, Sect. 54 as amended, 10-A F.C.A. 139, Title 45, Sect. 54 as amended.

The Court of Civil Appeals, in disposing of this case, said:

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> "It is true that appellant alleged that appellee railway company was negligent in the three respects stated, and that each of such acts constituted negligence and a proximate cause of his injury, but under his foregoing testimony his own disobedience of the time card instruction and the rules of appellee caused the collision and injury to himself. In consequence neither the provisions of the Federal Employers' Liability Act (Title 45, Sec. 51, U.S.C. Anno.) nor of Art. 6440 of the Revised Statutes of Texas have any application to the instant case." (151)

We quote from *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 Sup. Ct. 444, 143 A.L.R. 907:

> "We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment and Congress by abolishing the defense of assumption of risk in that statute did not mean to leave open the identical defense of the master by changing the name to 'non-negligence.' "

It is apparent that the trial court, and particularly the Court of Civil Appeals, seized upon *Davis v. Kennedy*, 266 U. S. 147, 69 L. Ed. 212, 45 Sup. Ct. 33; *Unadilla Valley R. Co. v. Caldine*, 278 U. S. 139, 73 L. Ed. 224, 49 Sup. Ct. 91; and the other "primary duty rule" cases, and in the instant case forced an effect here that resulted in those cases.

It is also clear that application of the "primary duty rule" has been made here in which the contributory negligence of Hunter through violation of a company rule has

become assumption of risk. This is no longer the law. *Keith v. Wheeling & L. E. Ry. Co., et al.* (Circuit Court of App.) 160 Fed. (2) 654.

It is not here contended that Hunter may not have been found guilty of contributory negligence of violating a rule of the company which it was his primary duty to obey. It is simply contended that in doing so he did not assume the risk of his master's negligence and that he was entitled to a submission of these negligence issues. *Lavender v. Kurn*, 327 U. S. 645, 90 L. Ed. 922, 66 Sup. Ct. 740. *Keith v. Wheeling & L. E. Ry. Co., et al.*, 160 Fed. (2) 654. *Tennant v. Peoria & Pekin U. R. Co.*, 321 U. S. 29, 88 L. Ed. 520, 64 Sup. Ct. 409, 15 NCCA (NS) 647.

In *Spokane & Inland Empire R. Co. v. Campbell*, 241 U. S. 497, 60 L. Ed. 1125, 1135, 36 Sup. Ct. 683, in commenting upon the negligence involved in a main line collision by reason of the violation of an order, this Court said:

> "From the fact that he disregarded and in effect violated the order as actually communicated to him, it, of course, does not necessarily follow that he did this wilfully. *(The jury was not bound to presume—it would hardly be reasonable to presume—that he deliberately and intentionally ran his train out upon a single track on which he knew an incoming train with superior rights was then due. However plain his mistake, the jury reasonably might find it to be no more than a mistake attributable to mental abberation, or inattention, or failure for some other*

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> *reason to apprehend or comprehend the order communicated to him. In its legal effect this was nothing more than negligence)* on his part, and not a departure from the course of his employment." (Italics ours.)

Keith v. Wheeling & L. E. Ry. Co., et al., 160 Fed. (2) 654, contains a state of facts which is analogous to the instant case, and states a principle of law which is here controlling.

The cases cited and relied upon by respondent in the Court of Civil Appeals have been named and overruled by the Supreme Court of the United States. *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 Sup. Ct. 444, 143 A.L.R. 967. *Keith v. Wheeling & L. E. Ry. Co., et al.*, 160 Fed. (2) 654.

Quoting again from *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 Sup. Ct. 444, 143 A.L.R. 967:

> "Aside from the difficulty of distinguishing between contributory negligence and assumption of risk, many other problems arose. *(One of these was the application of the 'primary duty rule' in which contributory negligence through the violation of a company rule became assumption of risk. Unadilla Valley R. Co. v. Caldine, 278 U. S. 139, 73 L. Ed. 224, 49 Sup. Ct. 91; Davis v. Kennedy, 266 U.S. 147, 69 L. Ed. 212, 45 Sup. Ct. 33. * * * It was this maze of law which Congress swept into discard with the adoption of the 1939 amendment to the Employers' Liability Act, releasing the employee from the burden of assumption*

> *of risk by whatever name it was called.)* • • • The theory that a servant is completely barred from recovery for injury resulting from his master's negligence, which legislatures have sought to eliminate in all of its various forms of contributory negligence, the fellow servant rule and assumption of risk, must not contrary to the will of Congress be allowed recrudescence under any other label in the common law lexicon. • • • *(No case is to be withheld from a jury on any theory of assumption of risk, and questions of negligence under proper charge from the court should be submitted to the jury for their determination.")* (Italics ours.)

The opinion of the Court of Civil Appeals reveals that it could have labored under no greater misapprehension of the law than it did. The Court of Civil Appeals by its opinion attempted to re-write into the Employers' Liability Act an exception that Congress in clear, unmistakable language wrote out of it. Congress did not say that certain risks would be assumed in the event of violation of a primary duty. Instead, it obliterated every vestige of assumed risk. The spectre of that narrow, illiberal, judicial reasoning that has scored the railroad worker these many years has again reared its ugly head.

Petitioner earnestly insists that the opinion of the Court of Civil Appeals wholly, incorrectly and wrongfully states the law of this case, and he earnestly insists that he was denied the right of trial by jury in the refusal to submit his liability issues against respondent.

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POINT NUMBER TWO

The error of the Court in refusing to submit to the jury issues of negligence on the part of respondent in employing the system it did for the passage of traffic in the sector of the collision.

ARGUMENT UNDER POINT NO. TWO

It is necessary to quote pertinent portions of petitioner's testimony:

> Right below the motorman's window is a train number box which is the number of your train. On this occasion I looked over my shoulder and thought I saw the man there. I did not definitely ascertain whether he was train 15 or whether he was carrying any signals. I didn't ascertain that that man had classification signals or car classification (R. 58-59). I went by there and I thought I saw him over there. It could have been an extra in there. I stopped there and waited there a half a minute and looked over my shoulder and said, 'there he is'. He didn't blow any signal. He was supposed to if he was carrying a green flag. (R. 81-2). My visibility was good that day. There was nothing to obstruct my view from seeing the car until I got to the stop. I did not see the man when I got to the pass. Then I got down there and looked over my shoulder. I had passed the telephone booth then and it appeared that it was a place there by the interurban. (R. 82)"

It further appears from petitioner's testimony, in substance, that respondent's cars were formerly manned by a conductor and a motorman, but that during the depres-

sion years of the early "thirties" the conductor was removed and his duties assumed by the motorman. (R. 45). His duties consisted in operating the car, reading the time card, making meeting points, identifying the cars, collecting fares, making out duplicate cash fare receipts, issuing the passenger a duplicate receipt, making change, fixing the trolley, and doing everything there was to do (R. 72, 73). All of these duties had been performed by Hunter for approximately ten years prior to the collision but under different circumstances. The volume of passengers and traffic at the time of the collision had increased ten-fold since the time the conductor had been removed (R. 81).

It is clear from the foregoing testimony that respondent, during the bleak, poverty-stricken years of the early "thirties" had retrenched its operating expenses by reducing its personnel and placing upon the shoulders of petitioner the multiplied responsibilities and duties of more than one man. It no longer left the motorman free to devote his exclusive attention to the operation of the car. But with the return of fruitful years and inordinate transportation burdens—while this nation writhed in the throes of an unparalleled transportation crisis—respondent railway, growing sleek and thoughtless, while its transportation and revenues mounted ten-fold, did not see fit to place conductors again upon its cars and lighten the burden of those situated as was petitioner. Instead, it chose to permit time and changing conditions to create a

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negligent and dangerous system for the passage of traffic in the Woodlake sector that finally resulted in the collision.

It is submitted that the conclusion created and inference to be drawn from the foregoing testimony is that there was another car, possibly an extra, at or near the Woodlake passing track which petitioner, looking over his shoulder, concluded to be train number 15. It developed that the car concluded to be number 15 was not in fact number 15. Proceeding further with this conclusion, the most that could be said was that Hunter's negligence consisted in failing to identify the car he thought he saw as number 15. It further appears from the testimony that the method of identification of a particular train was by the numbers contained in the train number box. It does not appear that the car, possibly an extra, which Hunter contended he took to be number 15, had any numbers in the train number box, or if it did, what those numbers were. There is no testimony showing that the train box numbers, if there were any, were visible to Hunter under the conditions and circumstances prevailing at the Woodlake sector. Hunter knew he was to meet number 15 at Woodlake. The time card instruction added nothing to his knowledge.

It is contended that the method of providing identification by numbers alone, in the light of all the multiplied and additional duties that had been vested upon petitioner and not removed, although traffic had increased ten-fold, was negligence. It is an inference and a con-

clusion that a jury would have been warranted in drawing. *Lavender v. Kurn*, 327 U. S. 645, 90 L. Ed. 922, 66 Sup. Ct. 740. The Court of Civil Appeals entirely misunderstood the contention here made.

Petitioner submits that this was an issuable fact of negligence which he was entitled to have submitted to the jury and that error was committed in not so doing. The effect of the holding of the trial court and the Court of Civil Appeals is to compel petitioner to assume the risk of this negligence. Petitioner here adopts in support of this contention the argument advanced under his First Point of Error.

POINT NUMBER THREE

The error of the Court in refusing to submit to the jury issues of negligence on the part of the southbound motorman, in failing to properly slow down his car before reaching the point of collision.

POINT NUMBER FOUR

The error of the Court in refusing to submit to the jury issues of negligence on the part of the southbound motorman in failing to apply his air brakes as he approached the point of collision.

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ARGUMENT UNDER POINTS NUMBERS THREE AND FOUR

The third and fourth points of error are germane to each other and can be properly covered together.

These issues were raised by the testimony of Maxwell, the southbound motorman, which, in substance, is materially as follows:

> "I was driving as fast as the car would go (R. 128). I wouldn't swear how fast they would go because they had no speedometers. But I had it wide open. I was on a straight-away track when I saw him and I had it wide open. When I saw Mr. Hunter's car I was on a straight-away track just prior to the time I reached the curve. I had it wide open—the car was going just as fast as I could make it go." (R. 129)

It is evident that the southbound motorman was on a straight-away track with his car wide open. It was going as fast as it was possible to make it go. This was on a straight-away track going into a curve. It was certainly testimony from which a jury may have concluded that the southbound motorman was failing to use the care that an ordinarily prudent person would have used under the same or similar circumstances. It is not sufficient to contend that Hunter's presence could not have been foreseen. The presence of someone rightfully upon the track could have been foreseen. It might have been a section crew. It might have been a hand-car. It might have been a stalled car. It might have been any combination of things. It was certainly an issuable fact for a jury to

say whether or not these acts set out in the foregoing testimony were negligence. The effect of the holding of the trial court and of the Court of Civil Appeals has visited upon this petitioner and forced him to assume the risk of these acts of negligence on the part of the south-bound motorman. In support of this argument petitioner here adopts the argument advanced under his First Point of Error.

CONCLUSION

WHEREFORE, petitioner respectfully prays that the judgment of the State Courts in this case, and of the Court of Civil Appeals, be reversed, and that this case be remanded to such Courts, to the end that uniformity may prevail and that justice may be done.

Respectfully submitted,

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